

83-516

Supreme Court, U.S.
FILED

IN THE SUPREME COURT OF THE UNITED STATES

SEP 22 1983

Term, 19

Alexander L. Stevas, Clerk

No.

SHEET METAL WORKERS PENSION PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA; SHEET METAL WORKERS WELFARE PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA; and SHEET METAL WORKERS SAVINGS PLAN OF SOUTHERN CALIFORNIA, ARIZONA AND NEVADA,

Respondents/Plaintiffs,

vs.

BAER MANUFACTURING, INC., a California corporation; MARLIN C. BAER, JOSE MONROY, and RENEE G. BAER, doing business as BAER MANUFACTURING, INC.; MARLIN C. BAER, JOSE MONROY, and RENEE G. BAER, individually and as Shareholders, Directors, and Officers thereof,

Petitioners/Defendants.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
AND APPENDIX

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QUESTIONS PRESENTED

The Court of Appeals actually did not issue an opinion or decision as such. Instead, it made a Memorandum (of decision) which did not state what the issues on appeal were. (See Appendix).

Petitioners contend that such Memorandum is deficient in that respect. And, moreover, the Memorandum did not raise and rule on all of the relevant and material issues raised on appeal, and for that reason the Supreme Court of the United States might conclude that there were no others, which is not the case at all as will hereinafter appear. Therefore, petitioners set forth all of the issues raised on appeal as the questions presented for review and decision, as follows:

1. (a) Was the preliminary injunction and the contempt order of the District Court void and ineffective for any purpose?

(b) If that be true, was the District Court's order striking petitioners'

answer and entering a default judgment against petitioners for failure to comply with said injunction and contempt order clearly erroneous and beyond the authority of the District Court?

2. Under the circumstances mentioned in numbers 1(a) and (b) above, and assuming the default judgment was legally authorized, in the case of a default judgment did the District Court have authority to grant relief outside of or in excess of the prayer of the complaint?

3. Under the circumstances mentioned in number 2, above, was a cause of action in alter ego stated by the complaint?

4. (a) Are punitive damages recoverable in actions founded in contract?

(b) Was the award of \$300,000.00 punitive damages in a contract action to recover \$17,000.00 (rounded off) clearly erroneous, given under passion and prejudice, and void?

5. As to the written contract of the parties, which provides upon delinquency the contract "shall be automatically cancelled and terminated without notice . . .", reinstateable only by (a) curing the default, (b) posting a bond, pay 10% and 5% delinquency fees, costs and attorney's fees, may the plaintiffs-respondents (Sheet Metal), after delinquency occurs and there is no reinstatement, recover delinquency and attorney's fees?

6. Did the District Court abuse its discretion in denying petitioners' motion for relief from the default and default judgment?

7. Did the District Court abuse its discretion in denying petitioners' motion for order extending the time for appeal?

As seen from the Memorandum (Appendix) the Court of Appeal confined its alleged opinion to abuse of discretion,

being questions presented Nos. 6 and 7,
above.

Although the questions presented are not necessarily unsettled questions of law, under the facts and circumstances here the decisions of the District Court and the Court of Appeal are so out of line with authoritative precedent and the weight of authorities that petitioners have been clearly deprived of their legal rights and property through passion and prejudice and without due process. This is the opinion of petitioners' counsel.

LIST OF PARTIES-ATTORNEYS OF RECORD

The caption of the case in this Court contains the names of all parties, except Jose Monroy who was a party in the District Court, but is not a party in this Court. Jose Monroy is included here for the reasons stated in the Statement of The Case and in Arguments II, IX, infra.

Petitioner Baer Manufacturing, Inc., a California corporation, will be referred

to as "Baer Corp."

Petitioners Marlin C. Baer and
Renee G. Baer, respectively, will be
referred to as "Marlin" and "Renee".

In the District Court, Baer Corp.,
Marlin, Renee, and Jose Monroy, defen-
dants, were represented by Jackson E.
Chandler, Esq. Present counsel, Nicolas
Ferrara, Esq., was substituted as counsel
for Baer Corp., Marlin and Renee after
Mr. Jackson disappeared and after entry
of the default judgment in the District
Court, and in the Court of Appeal.

Jose Monroy retained and was repre-
sented by Booth, Mitchel, Strange & Smith
by Hugh H. Helm, Esq., after Mr. Jackson
disappeared and after entry of the
default judgment in the District Court.

In the District Court and in the
Court of Appeal, the Sheet Metal parties
plaintiff-appellees-respondents were
represented by Gilbert, Cooke & Sackman
by Joseph L. Paller, Jr., and Kenneth J.

Sackman, a law corporation. Said parties
will be referred to as Sheet Metal.

	<u>TABLE OF CONTENTS</u>	<u>Page</u>
QUESTIONS PRESENTED	i	
LIST OF PARTIES- ATTORNEYS OF RECORD	iv	
INTRODUCTION.	2	
OPINION BELOW	2	
PETITION FOR REHEARING	2	
JURISDICTION	3	
STATEMENT OF THE CASE	4	
THE COMPLAINT	4	
PRAYER TO COMPLAINT	5	
ANSWER	5	
TEMPORARY RESTRAINING ORDER PRELIMINARY INJUNCTION	6	
CONTEMPT	6	
INCOMPETENT REPRESENTATION	7	
DEFAULT JUDGMENT	7	
MOTIONS FOR RELIEF	8	
GROUNDS FOR RELIEF	9	
MOTION FOR ORDER EXTENDING TIME FOR FILING NOTICE OF APPEAL	10	
DISTRICT COURT'S RULINGS ON MOTIONS FOR RELIEF AND TO EXTEND TIME FOR APPEAL	11	
REASONS FOR ALLOWANCE OF THE WRIT	11	
INTRODUCTION TO ARGUMENTS	13	

ARGUMENT 14

I

PETITIONERS' MOTION FOR EXTENSION
OF TIME TO FILE NOTICE OF APPEAL
WAS TIMELY FILED. IT IS NOT TRUE
AS THE COURT OF APPEAL STATED THAT
THE MOTION WAS UNTIMELY 14

II

PETITIONERS' PREDICAMENT BEFORE
THE DISTRICT COURT WAS DUE TO
INCOMPETENT AND INEFFECTIVE
COUNSEL WHOSE OUTRAGEOUS CONDUCT
PREJUDICED PETITIONERS. IT WAS
NOT SIMPLY THAT THEIR COUNSEL
DISAPPEARED AS THE COURT OF
APPEAL STATED 17

III

1. IN THE CASE OF A DEFAULT
JUDGMENT THE DISTRICT COURT
HAD NO JURISDICTION TO GRANT
RELIEF OUTSIDE OR IN EXCESS
OF THE COMPLAINT. IF THE
COURT DOES, THE DEFAULT
JUDGMENT MAY BE COLLATERALLY
ATTACKED FOR LACK OF JURIS-
DICTION AND DUE PROCESS . . . 23
2. THE COURT OF APPEAL DID NOT
MENTION OR RULE ON THOSE
ISSUES THOUGH RAISED IN THE
DISTRICT COURT AND ON APPEAL 23

IV

1. THE COMPLAINT DID NOT STATE A CAUSE OF ACTION IN ALTER EGO. NOR WAS ALTER EGO PROVEN. . . .	32
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THAT ISSUE THOUGH RAISED IN THE DISTRICT COURT AND ON APPEAL	32

V

1. PUNITIVE DAMAGES ARE NOT RECOVERABLE IN ACTIONS FOUNDED IN CONTRACT	35
2. ASSUMING A TORT WAS INVOLVED, THE AWARD OF \$300,000.00 PUNITIVE DAMAGES AGAINST THE CORPORATION AND THE INDIVIDUALS WAS CLEARLY ERRONEOUS, GIVEN UNDER PASSION AND PREJUDICE, AND VOID	35
3. THE COURT OF APPEAL DID NOT MENTION OR RULE ON SUCH ISSUES THOUGH RAISED IN THE DISTRICT COURT AND ON APPEAL	35

VI

1. THE DISTRICT COURT HAD NO JURISDICTION TO IMPOSE PUNITIVE DAMAGES OR SANCTIONS	42
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THAT ISSUE THOUGH RAISED IN THE DISTRICT COURT AND ON APPEAL	42

VII

1. THE PRELIMINARY INJUNCTION AND THE CONTEMPT ORDER OF THE DISTRICT COURT WERE VOID AND ON THAT GROUND DID NOT PROVIDE A BASIS FOR THE DISTRICT COURT'S ORDER STRIKING ANSWER, ORDER FOR DEFAULT JUDGMENT, AND DEFAULT JUDGMENT. 49
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THOSE ISSUES RAISED IN THE DISTRICT COURT AND ON APPEAL 49

VIII

1. SINCE THE BASIS FOR CONTEMPT IS THE WILFUL REFUSAL OR FAILURE TO COMPLY WITH THE PRELIMINARY INJUNCTION, SHEET METAL HAD THE BURDEN OF PROVING WILFUL REFUSAL OR FAILURE TO COMPLY WHICH SHEET METAL FAILED TO SUSTAIN, AND THE CONTEMPT ORDER WAS VOID ON THAT GROUND 53
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THOSE ISSUES RAISED IN THE DISTRICT COURT AND ON APPEAL 54

IX

1. THE DEFAULT JUDGMENT SHOULD HAVE BEEN VACATED AND RELIEF PROVIDED TO PETITIONERS IN ACCORDANCE WITH FRCP 60(b)(1) AND/OR 60(b)(6) 57

2. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONERS' MOTION FOR RELIEF	57
3. THE COURT OF APPEAL ERRED IN AFFIRMING THE DENIAL OF RELIEF	57

X

1. FIVE WRITS OF EXECUTION ON THE ALLEGED DEFAULT JUDGMENT WERE ISSUED AND LEVIED OVER ONE MONTH BEFORE THE DISTRICT COURT MADE, SIGNED AND FILED THE DEFAULT JUDGMENT	60
2. THE DISTRICT COURT REFUSED TO RECALL AND QUASH THE WRITS. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THAT ISSUE	60

APPENDIX

Memorandum of United States Court
of Appeal For The Ninth Circuit

TABLE OF CASES, STATUTES,
AND TEXT BOOKS CITED

Cases

	<u>Page</u>
Ackerman v. United States 340 U.S. 193, 202,95 L.Ed.207(1950)	20
Allard v. Church of Scientology etc. (1976) 58 Cal.App.3d 439, 129 Cal.Rptr. 797	42
Bank of Waukegan v. Freshley (DC Ind. 1976) 421 F.Supp.1033 . . .	32
Beck v. State Farm (1976) 54 Cal.App.3d 347,126 Cal.Rptr. 602	37
Becker v. S.P.V. Const. Co., Inc. (1980) 27 Cal.3d 489, 165 Cal.Rptr. 825	24,25
Betty Stein v. Erwin Hassen (1973) 34 Cal.App.3d 294, 109 Cal.Rptr.321	44
Bronsseau v. Jarrett (1977) 73 Cal.App.3d 864,141 Cal.Rptr. 200	37
Broughner v. Seeretary of Health, Education & Welfare, 527 F.2d 976, 978 (3rd Cir. 1978)	20
Buckert v. Briggs (1971) 15 Cal.App.3d 296,93 Cal.Rptr. 61 .	23
Burtnett v. King (1949) 33 Cal.2d 805, 205 P.2d 657	24,25
Butler v. McKey (CC Calif. 1943) 138 F.2d 373	38
Colonial Realty Corp. v. Bache & Co. (2d Cir. 1966) 358 F.2d 178,181,182	40

	<u>Page</u>
Crogan v. Metz (1956) 47 Cal.2d 398, 405; 303 P.2d 1029	37
Daley v. Butte (1964) 227 Cal.App.2d 380, 38 Cal.Rptr. 693	22
Deyo v. Kilbourne (1978) 3d 771, 149 Cal.Rptr. 499	59, 60
Douglass v. Todd (1892) 96 Cal. 655, 658, 31 P.623	22
Dryden v. Tri-Valley Growers (1977) 65 Cal.App.3d 990, 135 Cal.Rptr. 720	37
Fay v. Noia (US NY) 372 U.S. 391, 423	25
Fishei v. Kite (App. DC 1939) 101 F.2d 685	25
Goodwin v. Home Buying Inv. Co. (DC 1973) 352 F.Supp. 413	38
Gruenberg v. Aetna Ins. Co. (1973) 9 Cal.3d 566, 586, 108 Cal.Rptr. 480, 493	41
Haigler v. Donnelly (1941) 18 Cal.2d 674, 680, 117 P.2d 331 . .	37
Hofmayer v. Dean Witter & Co. (DC 1978) 459 F.Supp. 733	37
Housing Development Co. v. Hoschler 85 Cal.App.3d 379, 389, 149 Cal.Rptr. 400	40
Hutchins v. Priddy (DC Mo. 1952) 103 F.Supp. 601	25, 26
Jacuzzi v. Jacuzzi Bros., Inc. (1966) 243 Cal.App.2d 1, 52 Cal.Rptr. 147 .	44
Jones v. Kelly (1929) 208 Cal.251, 280 P.942	37

	<u>Page</u>
Montalvo v. Zamora (1970) 7 Cal.App.3d 69,86 Cal.Rptr.401,405	41
Orange Empire National Bank v. Kirk (1968) 259 Cal.App.2d 347,353, 66 Cal.Rptr. 240	23
People v. Alves (1958) 155 Cal.App.2d Supp. 870,872 320 P.2d 623	40,54,57
Phillips v. Superior Court (1943) 22 Cal.2d 256,258,137 P.2d 838 . .	51,57
Prudential Ins. Co. v. Zimmerer (DC Nebr. 1946) 66 F.Supp.492 . .	26
Pueblo Trading Co. v. El Camino Irr. Dist. (CC Calif. 1948)169 F.2d 312	25
Richardson v. Employers Liability Ass. Corp. (1972) 25 Cal.App.3d 232, 102 Cal.Rptr. 547	43
Roam v. Koop (1974) 41 Cal.App.3d 1035, 116 Cal.Rptr. 539	37,43
Rose v. Lawton (1963) 215 Cal.App.2d 18,20, 29 Cal.Rptr.844	26,35
Seymour v. Hull & Moreland Engineering, 605 F.2d 1105 (9th Cir. 1979)	33,34
Swickheimer v. King (1971) 22 Cal.App.3d 220,99 Cal.Rptr.176	40
Thayer Plymouth Center v. Chrysler Motors Corp. (1967) 255 Cal.App.2d 300, 304, 63 Cal.Rptr. 148	52
Vasey v. California Dance Co.,Inc. 70 Cal.App.3d 742 (1977) 139Cal.Rptr. 72	33

	<u>Page</u>
Werschkull v. UCB (1978) 85 Cal.App.3d 981, 149 Cal.Rptr. 829	25
Williams v. Foss (1924) 69 Cal.App.705, 707, 231 P.766. . .	26, 35
Wulfjen v. Dolton (1944) 24 Cal.2d 878, 151 P.2d 840 . . .	26
Zhadan v. Downtown L.A. Motors (1976) 66 Cal.App.3d 481, 136 Cal.Rptr. 132	42

STATUTES, RULES, TEXBOOKS

	<u>Page</u>
<u>Calif. Code of Civil Procedure,</u>	
Section 425.10	24
473	25
526 subd. (5)	52
580	24
585(1)(2)	24
<u>Calif. Civil Code</u>	
Section 3097(k)	7, 36, 40, 58
3116	53
3294	37, 43
3423(5)	45, 52
3432	38, 39
3451	38
<u>Labor Code, Section 227</u>	58
<u>FRAP</u> , Rule 4(a)(1)(5)	14
Rule 4(a)(1)	15
Rule 40	3
<u>FRCP</u> , Rule 52(c)	25
59(e)	25
60	25
60(a)(b)	25
60(b)	21, 22
60(b)(1)	19, 21, 57
60(b)(6)	19, 20, 21, 57
62(b)	25
3 <u>Witkin Calif. Proced.</u> 2d Ed. pp. 1971-1972, 2006, 2008, 2010 . .	40
5 <u>Witkin Calif. Proced.</u> 2d Ed. p. 3508, sec. 146	38

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Petitioners/Defendants.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The above-entitled proceedings in the U. S. Court of Appeals for the Ninth Circuit have the following case numbers:

Civil Case No. C.A. 82-5035
DC Central California
No. CV 81-652 MRP

INTRODUCTION

Petitioners pray that a writ of certiorari issue to review the Memorandum (Opinion) of the United States Court of Appeals for the Ninth Circuit entered on June 24, 1983.

OPINION BELOW

The Memorandum (Opinion) of the United States Court of Appeals for the Ninth Circuit is in the Appendix hereto, and is not yet reported in the official reports to petitioners' knowledge.

PETITION FOR REHEARING

On June 24, 1983, the Court of Appeal filed its Memorandum affirming the District Court's Orders, which was received by petitioners' counsel on June 30, 1983, at a time when the July 4th holiday weekend intervened. The mail delivery delay and the holiday consumed ten days, and the following three days counsel was court engaged.

FRAP, Rule 40 provides that within 14 days the petition for rehearing is to be filed unless the time is enlarged. Since counsel had no time left to file a petition for rehearing, counsel applied for an enlargement of time which was filed by mail on July 7, 1983, with the Court of Appeal. On August 12, 1983, the application was denied.

Petitioners had a meritorious petition for rehearing which would have been filed, except for the denial. Had the time been enlarged, counsel feels confident that a rehearing would have been granted, as will hereinafter appear, and another case load would have been taken off of the Supreme Court.

JURISDICTION

The Memorandum (Opinion) in the Appendix hereto, which is sought to be reviewed is dated, filed and entered on June 24, 1983.

The jurisdiction of this Court is

invoked under Section 1257(3) of Title 28
of the United States Code.

STATEMENT OF THE CASE

Under a written agreement with the Sheet Metal Plan, Baer Corp. failed to make monthly payments required of it who was the sole signatory to the Sheet Metal plan.

THE COMPLAINT

When Baer Corp's delinquency continued, Sheet Metal, on February 10, 1981, filed a complaint in five counts for breach of contract against Baer Corp., as the debtor, to recover \$16,960.88, plus delinquency fees, of at least \$5,000.00. Marlin, Renee and Monroy were sued only in their capacity as acting officers, directors and shareholders of Baer Corp. In the 4th and 5th counts only, Baer Corp. was alleged to be the alter ego of the three individuals, and Sheet Metal Plan sought \$300,000.00 punitive damages.

The complaint did not allege fraud and

deceit, or any other tort, which is the basis for an award of punitive damages.

PRAYER TO COMPLAINT

As to Counts 1, 2 and 3, Sheet Metal prayed to recover "in accordance with proof." No defendants (petitioners) were named.

As to Counts 4 and 5 Sheet Metal prayed to recover "in accordance with proof" against Baer Corp., Marlin, Renee and Monroy, and for \$300,000.00 punitive damages against them.

As to all counts Sheet Metal prayed for attorney's fees against all defendants (petitioners and Monroy).

ANSWER

Baer Corp., Marlin, Renee and Monroy denied the material allegations of all counts of the complaint. Certain affirmative defenses were alleged, which will be referred to infra, if proved necessary.

TEMPORARY RESTRAINING ORDER

PRELIMINARY INJUNCTION

Sheet Metal obtained ex parte a temporary restraining order (TRO) and order to show cause (OSC), which was served only on Renee and Baer Corp. At the hearing thereon, Jackson E. Chandler (as counsel for Baer Corp., Marlin, Renee and Monroy) was present. The District Court made and issued a preliminary injunction. The injunction was served by mail on Mr. Chandler, but was not served on Baer Corp., Marlin, Renee and Monroy.

CONTEMPT

Thereafter Sheet Metal moved to hold Baer Corp., Marlin, Renee and Monroy in contempt for disobedience of the injunction. The moving papers were served on Mr. Chandler only. The District Court held Baer Corp., Marlin, Renee and Monroy in contempt and entered its contempt order on May 28, 1981, and awarded Sheet Metal

\$1,500.00 attorney's fees and costs.

INCOMPETENT REPRESENTATION

Mr. Chandler did file a memorandum in opposition to the contempt motion which showed on its face that Baer Corp., Marlin, Renee and Monroy did not have adequate, competent, effective representation.

The basis for the injunction and contempt order was that Baer Corp. failed to furnish mechanic lien information for the delinquency period as allegedly required by California Civil Code, section 3097(k).

The contempt order was not served on Baer Corp., Marlin, Renee and Monroy.

DEFAULT JUDGMENT

Sheet Metal then moved the District Court to strike the answer and grant a default judgment for failure to comply with the contempt order, which the District Court granted and made an order striking the answer and order for default judgment, which was entered on June 30, 1981. On August 31, 1981, the default judgment was entered.

MOTIONS FOR RELIEF

Baer Corp., Marlin, Renee, and Monroy moved the District Court for orders,

1. Vacating the order striking answer.
2. Vacating the order for default judgment and the default judgment.
3. Granting moving parties leave to defend Sheet Metal's action, and reinstating their answers.
4. Vacating the order for default judgment and the default judgment by striking therefrom the award of
 - (a) actual damages of \$6,174.91, plus \$10,903.64 liquidated damages;
 - (b) actual damages of \$3,329.94, plus \$5,223.79 liquidated damages;
 - (c) actual damages of \$7,685.26, plus \$7,205.25 liquidated damages;
 - (d) \$300,000.00 punitive damages;
 - (e) \$4,750.00 attorney's fees, plus \$372.02 costs,
for the total amount of \$17,190.11 actual damages, \$23,332.68 liquidated damages,

\$300,000.00 punitive damages, \$4,750.00 attorney's fees, and \$372.00 costs, as stated in the default judgment.

5. For order recalling and quashing five writs of execution issued not on the judgment, but on the order for judgment made 60 days previous to the judgment.

GROUND FOR RELIEF

1. The complaint was against Baer Corp. who only signed the Sheet Metal Plan alleged agreement, and who only breached the alleged contract.

2. The complaint alleged Baer Corp. was alter ego of Marlin, Renee and Monroy. No cause of action in alter ego was alleged.

3. In case of a default judgment the District Court had no jurisdiction/authority to grant relief outside of or in excess of the prayer of the complaint.

4. The preliminary injunction and the contempt order were void, and no basis existed for the District Court's order striking answer, order for default judgment

and default judgment.

5. Punitive damages are not recoverable in actions founded in contract.

6. The default and default judgment were made through mistake, inadvertence, surprise, excusable neglect, misconduct and incompetence of their attorney,

Jackson E. Chandler.

7. Passion and prejudice.

8. The writs of execution were issued two months before filing and entry of the default judgment and were void.

In the motions for relief Monroy was represented by Hugh H. Helm, Esq., and his separate motion was identical to petitioners' motions as to motions for relief Nos. 1, 2, 3, and grounds for relief Nos. 1, 2, 3, 4, 5.

MOTION FOR ORDER EXTENDING TIME FOR
FILING NOTICE OF APPEAL

The default judgment was filed/entered on August 31, 1981. The order for said judgment was filed/entered on June 30, 1981.

On August 28, 1981, petitioners filed their motion to extend the appeal time, which was denied on August 31, 1981, on procedural grounds.

On September 25, 1981, petitioners filed their second motion to extend the appeal time.

DISTRICT COURT'S RULINGS ON MOTIONS

FOR RELIEF AND TO EXTEND TIME FOR APPEAL

The motions for relief were set to be heard on October 26, 1981. On that date the District Court continued the hearing of said motions and the second motion to extend the appeal time, to November 5, 1981. On that date, the District Court denied the motions for relief and to extend the appeal time, but granted the motion for relief filed by Monroy. As previously stated Monroy's motion was identical in substance to petitioners' motion.

REASONS FOR ALLOWANCE OF THE WRIT

The reasons or grounds for allowance of the Writ are:

1. This Court is urged to settle

important questions and issues of fact and law. Substantial issues of law and facts were avoided, ignored, incorrectly stated, and not considered in the opinion of the Court of Appeal even though such questions and issues were raised and briefed by petitioners in the District Court and on appeal to the Court of Appeal, as will hereinafter appear.

2. Had the Court of Appeal considered all of the questions and issues presented and ruled thereon, in counsel's opinion the Court of Appeal would have had to reverse the orders and judgment of the District Court. In failing and refusing to do so, petitioners have been denied due process in that the District Court made orders without authority and jurisdiction.

3. It appears necessary to secure uniformity of decision, or settlement of important questions of law.

4. The following are further reasons for allowance of the Writ.

INTRODUCTION TO ARGUMENTS

The Memorandum Opinion of the Court of Appeals leaves much to be desired. In deciding the case on review, said Court overlooked, misapprehended, and mistated, the facts and the law, and in part decided main issues on hearsay, all under the protective cover of the illusive discretion.

The case here involved many material issues of law challenging the jurisdiction of the District Court to make the orders by collateral attack, none of which the Court of Appeal mentioned or ruled on. And, moreover, petitioners were represented by a wholly incompetent and ineffective attorney whose outrageous conduct prejudiced the petitioners and Monroy before the District Court.

Recently, Chief Justice Warren E. Burger justifiably had much to say about such incompetent representation. And after reading this petition and the Memorandum Opinion of the Court of Appeal, I am confi-

dent there will be similar thoughts reaching out in all directions as to whether or not a litigant is given due process on appeal. The only way this Court can reach a justifiable conclusion in that respect is by reference to the record on appeal which will show unmistakeably what is stated in this petition.

This case comes squarely within Part V, Rule 17, Jurisdiction on Writ of Certiorari, Considerations Governing Review on Certiorari, Rules of The Supreme Court of The United States.

I

PETITIONERS' MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL WAS TIMELY FILED. IT IS NOT TRUE AS THE COURT OF APPEAL STATED THAT THE MOTION WAS UNTIMELY.

FRAP 4(a)(1)(5) authorized the filing of a motion to extend the time for filing a notice of appeal. The order for default judgment was entered on June 30, 1981. On

August 28, 1981, petitioners filed their first ex parte extension motion which was denied on August 31, 1981, for not showing good cause or excusable neglect. On August 31, 1981, default judgment was entered. On September 25, 1981, petitioners filed their second ex parte motion to extend the appeal time, being within 30 days as provided by FRAP 4(a)(1), based on fact petitioners had at the same time filed their motion for relief from the default and default judgment, which if granted would make the appeal moot, whereas an appeal within the 30 days would have made the motion for relief moot. The District Court deferred ruling on the extension motion until October 26, 1981, and on that date again deferred ruling thereon to November 5, 1981, at which time the extension motion as well as the motion for relief were denied.

As seen from the above, it is undisputed the extension motion to file an appeal was timely filed within the 30 days period.

The issue of good cause and excusable neglect applies not to the within 30 days period, but to the 30 days next following.

As further seen, both the District Court and the Court of Appeal were clearly erroneous in concluding the extension motions were filed untimely. There was good cause to grant the second extension motion and extend the appeal time, because of the pending motion for relief and the second extension motion was specifically based and grounded on the pending motion and the facts alleged for relief which was made under oath/penalty of perjury, which shows that the holding of both the District Court and Court of Appeal that the motion was unsupported is untrue. What probably happened was that said courts had the first motion in mind (which was unsupported and denied on that ground on August 31, 1981), and totally by-passed the second extension motion.

Petitioners should not suffer the loss

of their appeal rights due to the Court's inadvertence and clearly erroneous conclusions.

It was legally inappropriate for the District Court to box petitioners in the position stated, to prevent review by denying both the motions for relief and for extension of time for appeal, which is certainly not judicial discretion exercised within the bounds of reason. To deny a litigant's right to appeal is to deny due process.

II

PETITIONERS' PREDICAMENT BEFORE THE DISTRICT COURT WAS DUE TO INCOMPETENT AND INEFFECTIVE COUNSEL WHOSE OUTRAGEOUS CONDUCT PREJUDICED PETITIONERS.

IT WAS NOT SIMPLY THAT THEIR COUNSEL DISAPPEARED AS THE COURT OF APPEAL STATED.

The Court of Appeal would have this Supreme Court impliedly believe that petitioners' counsel simply disappeared,

before default judgment and new counsel was not replaced until August 27th, after judgment, which is not the case at all. What caused the District Court to strike the answer and enter the default judgment was in part due to Mr. Chandler's incompetence and outrageous conduct as indicated in the documents he filed with the District Court, being CR (DC)19 and CR(DC) 32. Very briefly in CR 19, Mr. Chandler argued in opposition to contempt, the Declaration of Independence, harassment, vendetta, legal extortion, abusive and coercive action on part of Sheet Metal and their attorneys. In CR 32, Mr. Chandler argued, in opposition to discovery, strike answer and default judgment, petitioners' rights to life, liberty and the pursuit of happiness. The Taft Hartly Act, the poverty problems of the world imminent at war, economics and world economy, fiscal problems, extortion, using FRCP as the gun and the Court's ego as the trigger, what Thomas Jefferson advocated, and finally, if not last, Mr.

Chandler stated,

"I have advised my clients, the defendants herein, not to comply with the Court's orders . . .".

The petitioners by new counsel filed their declarations under oath for relief stating that none of the aforementioned was at any time previously known or authorized by them, and at no time did Mr. Chandler advise petitioners not to comply with the Court's orders. (CR(DC) 49,66,67).

FRCP 60(b)(1) and/or 60(b)(6) warranted relief. Petitioners should not be held to Attorney Chandler's personal actions in declining to fully comply with the Court's discovery orders based on his own notions of social policy and civil rights. Since the District Court granted Monroy relief on this ground among others, no logical reasons existed for the same Court to deny relief to petitioners on the same ground.

The Court of Appeal's further statement that "no evidence was presented in support

of that contention. There was thus insufficient 'excuse or explanation' for Baer's failure to comply" finds no support in the record. In their motion for relief petitioners' factual declarations incorporated the factual declarations of Monroy pertinent and relevant to that point, and to Mr. Chandler's declaration to the Court, quoted above of which petitioners were totally unaware. That record speaks for itself.

Rule 60(b)(6), which permits the vacating of a judgment "for any other reason justifying relief", provides an extraordinary remedy upon a showing of exceptional circumstances. This rule envisions relief for a party from "neglect so gross that it is inexcusable". Such an instance is when an attorney abandons his client and places extreme, unexpected hardship on that party.

Ackerman v. United States 340 U.S., 193, 202, 95 L.Ed. 207 (1950).
Broughner v. Secretary of Health, Education & Welfare, 527 F.2d 976, 978 (3rd Cir. 1978).

Here, there is no question the default was entered based on attorney Chandler's

conscious refusal to comply fully with discovery and the Court's orders for his own reasons⁵ without consulting his clients, was so neglectful of his clients' interest, so outrageous in its character as to constitute the necessary exceptional and extraordinary circumstances required for relief under Rule 60(b). Attorney Chandler abandoned his client's interest to pursue his own notion of social policy, left his clients wholly unprotected in the face of the Court's clear order regarding discovery. This presents a compelling case for relief under Rule 60(b). Defendants could not protect, and had been deprived of an opportunity to defend, their interest in this lawsuit. Whether this case falls within Rule 60(b)(1) or 60(b)(6) or both, their failure was due to their limited knowledge regarding the lawsuit, their reliance placed on Attorney Chandler who took an outrageous position,

⁵ The reasons expressed by Attorney Chandler for refusing to comply with discovery orders are expressed in his Opposition to Motion for Discovery and Motion to Strike Answer. (DC 32).

demonstrate extraordinary and exceptional circumstances which provide unassailable grounds for relief under Rule 60(b).

In Douglass v. Todd (1892) 96 Cal.655, 658, defendant's attorney advised he had no defense. Relying thereon he did not answer. The Court held that excusable. Defendant was not guilty of negligence. He went to a practicing attorney, and had a right to suppose him to be competent, and was justified in acting on his advice. This case has been frequently cited, but never overruled.

Daley v. Butte (1964) 227 Cal.App.2d 380 parallels the instant case. The attorney was guilty of "gross" misconduct, and not negligence, or ignorance or mistake of the law. The Court held no lay person could be expected to know what goes on in Court between counsels and the judge, and should not have to pay the extreme penalty on account of his counsel's misconduct. In effect, the plaintiff was deprived of representation by her nominal counsel of record.

In Buckert v. Briggs (1971) 15 Cal.App. 3d 296, the Court held the attorney did not represent his clients, as shown by his conduct. His misconduct resulted in the client's failure to attend trial, was the product of extrinsic surprise and mistake without negligence.

In Orange Empire National Bank v. Kirk (1968) 259 Cal.App.2d 347, 353, attorney took no action to prevent default or seek relief from the default judgment. Relief granted.

III

1. IN THE CASE OF A DEFAULT JUDGMENT THE DISTRICT COURT HAD NO JURISDICTION TO GRANT RELIEF OUTSIDE OR IN EXCESS OF THE COMPLAINT. IF THE COURT DOES, THE DEFAULT JUDGMENT MAY BE COLLATERALLY ATTACKED FOR LACK OF JURISDICTION AND DUE PROCESS.
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THOSE ISSUES THOUGH RAISED IN THE DISTRICT COURT AND ON APPEAL.

In this case petitioners attacked the trial court orders and judgment by default both in the trial court and in the Court of Appeal by collateral attack. Where the trial court exceeds its authority it is subject to collateral attack for lack of due process.

Becker v. S.P.V. Const. Co., Inc. (1980)
27 Cal.3d 489
Burtnett v. King (1949) 33 Cal.2d 805

The Becker case involved a default judgment which was attacked collaterally for lack of personal or subject matter jurisdiction, or for granting relief which the Court had no power to grant. The Becker court held the trial court had no power to enter a default judgment other than in conformity with California Code of Civil Procedure, section 580, no relief can be granted in excess of that demanded in the complaint, which otherwise is a denial of due process, citing sections 425.10 and 585(1)(2) of the same code. No recovery can be had for damages or attorney's fees

"in accordance with proof", if no specific amount is alleged.

Burtnett v. King (1949) 33 Cal.2d 805, supra
Werschkull v. UCB (1978) 85 Cal.App.3d 981
FRCP 52(c) in accord.

FRCP 60(a)(b) authorized relief from orders and judgments by default on grounds stated in Rules 60 and 62(b) to alter or amend the judgment.

The 10 days rule (FRCP 59(e)) and the six months statute (Calif. C.C.P., sec.473) do not preclude or bar relief.

Becker case, supra.

Unless the order or judgment conforms to the complaint the default order or judgment is a nullity.

Pueblo Trading Co. v. El Camino Irr. Dist.
(CC Calif. 1948) 169 F.2d 312
Fay v. Noia (US NY) 372 U.S. 391, 423
Fishel v. Kite (App. DC 1939) 101F.2d 685
Hutchins v. Priddy (DC Mo. 1952)
103 F.Supp. 601

The complaint may not be supplemented by a collateral or other document. Thus, in this case Sheet Metal's notice of motion to strike answer and for default judgment was insufficient to obtain relief beyond the

scope of the complaint. The different relief must be by process personally served on the defendants, and state law must be applied.

Hutchins v. Priddy, supra

Prudential Ins. Co. v. Zimmerer (DC Nebr. 1946) 66 F.Supp. 492

The point of law stated in this Argument is applicable to each of the Arguments set forth in this petition even in a case where the complaint or any count therein or part thereof does not state sufficient facts to constitute a cause of action.

Thus, a defaulting defendant admits only facts well pleaded. If no cause of action is pleaded, or the allegations plaintiff pleaded do not support the demand for relief, plaintiff is not entitled to any relief by default judgment.

Williams v. Foss (1924)

69 Cal.App. 705, 707

Rose v. Lawton (1963)

215 Cal.App.2d 18, 20

The cause of action is distinguished from the relief sought.

Wulfjen v. Dolton (1944) 24 Cal.2d 89

The contract here specifically provided upon the first delinquency the contract "shall be automatically cancelled and terminated without . . . notice . . ."

Sheet Metal alleged in its complaint the first delinquency occurred in June, 1980, and the action filed on February 10, 1981, was to recover delinquent contributions for June, September, October and November, 1980, plus delinquency fees for the same period and attorney's fees. (CR (DC) 1). It therefore appears that there was no written contract to sue on when the complaint was filed, in which case the District Court had no authority, especially in a default case, to award delinquency and attorney's fees.

Applying the foregoing to the complaint herein, it is undisputed the first, second and third counts were only against Baer Corp. The prayer No. 1 asked for judgment "in accordance with proof." Paragraph 11 states "in at least the following amounts", which totalled \$16,960.98. Paragraph 12 states

the delinquency fees are "at least" \$5,000.00. Since no relief can be had in a default case beyond the complaint, Sheet Metal can only recover \$10,460.98 (\$16,960.98 less \$6,500.00 paid) under said three counts, and against Baer Corp. only.

The fourth and fifth counts were only against Baer Corp., except that Sheet Metal sought to hold the individuals Marlin, Renee and Monroy as Baer Corp.'s alter ego. Those two counts were for the same dollars alleged in the first three counts. Prayer No. 2 asked for judgment on those two counts against all defendants for only general damages "in accordance with proof." No amount of general damages was alleged in the complaint or prayer. Under those two counts Sheet Metal can recover only against Baer Corp. the sum of \$10,460.98. No general damages can be awarded in any amount.

Prayer No. 3 asks for punitive damages only, against all defendants, for \$300,000.00 "or in accordance with proof." To recover punitive damages in any amount the complaint

must state a cause of action in tort, and in alter ego if recovery is sought against Marlin, Renee and Monroy. If no cause of action in tort and alter ego is stated no recovery can be had in any amount. Since the complaint does not state a cause of action in tort and alter ego, no recovery is allowed. See Arguments IV,V,VI infra, which deals with this subject matter exclusively.

Prayer No. 6 asks for attorney's fees. No amount is stated in the complaint or in the prayer. No attorney's fees can be awarded in any amount.

As to delinquency fees and attorney's fees, none can be recovered, because the contract which provided for same automatically cancelled and terminated without notice upon the first delinquency which occurred sometime in June, 1980, more than nine months prior to filing the complaint.

That the District Court exceeded its authority appears from the Court's order for default judgment and the default judgment (CR (DC) 36, 46) which show:

1. For contributions owed (damages), \$17,190.11 was awarded for the period from June, 1980 to January, 1981, against all defendants jointly and severally.

That amount is \$6,729.13 more than the amount alleged in the complaint less the amount paid; and no amount was alleged for December 1980, and January 1981. Since no cause of action in alter ego was stated, no such recovery can be had against the individuals.

2. The sum of \$23,332.68 was awarded as and for liquidated damages for the period from July 1978 through January 1981, against all defendants jointly and severally.

The complaint alleged delinquency fees, not liquidated damages, in at least \$5,000.00 for the period alleged from June 1980 through November 1980. There was no allegation of any other periods or of any other amounts alleged in the complaint, and it is obvious the District Court had no authority to make an award for any period prior to June, 1980,

and subsequent to November 1980, assuming the Court had authority to make an award which would be limited to \$5,000.00 in any event. But since there was no contract in existence, as aforesaid, the Court had no authority to make an award in any amount. And since no cause of action in alter ego was stated there could be no award against Marlin and Renee.

3. The Court awarded \$4,750.00 attorney fees against all defendants.

As to Nos. 2 and 3, above, since the contract was cancelled automatically some nine months before action was filed, and since the complaint did not allege any amount of fees and liquidated damages, no basis existed for such awards; and since no cause of action in alter ego was stated, no such recovery can be had in any event against the individuals.

When exercising its diversity jurisdiction, a Federal District Court is, in effect, another State Court and is compelled to

follow State law.

Bank of Waukegan v. Freshley
(DC Ind. 1976) 41 F.Supp. 1033

Under the circumstances stated, the District Court had no jurisdiction to grant relief in a default judgment. Although each of the above was raised in the trial court and on appeal, the Court of Appeal did not mention or rule on any of those points in its Memorandum Opinion.

IV

1. THE COMPLAINT DID NOT STATE A CAUSE OF ACTION IN ALTER EGO. NOR WAS ALTER EGO PROVEN.
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THAT ISSUE THOUGH RAISED IN THE DISTRICT COURT AND ON APPEAL.

Marlin and Renee, and Monroy were sued as officers, directors and shareholders of Baer Corp., and in the 4th and 5th counts, Sheet Metal alleged that Baer Corp. was the alter ego of Marlin, Renee and Monroy in that (a) there existed unity of interest and ownership; (b) separateness ceased to exist; (c) individuals guaranteed Baer

Corp.'s debts; (d) managed Baer Corp. assets for personal use and convenience, to evade Baer Corp. to pay its debts and prevent creditors from enforcing their personal guarantees; (e) conceal mechanic lien information; (f) failure to pay contributions. (Complaint pars. 30, 32; CR (DC) 1).

Sheet Metal has alleged alter ego as a legal conclusion and on hearsay that the individuals have guaranteed and engaged in unspecified obligations and manipulation of corporate assets for personal reasons, which form the only basis for the claim of such liability. The following cases hold that no cause of action in alter ego was alleged and a judgment in alter ego liability was reversed.

Vasey v. California Dance Co., Inc.,
70 Cal.App.3d 742, 139 Cal.Rptr. 72 (1977)
Seymour v. Hull & Moreland Engineering,
605 F.2d 1105 (9th Cir. 1979)

The Vasey court held the allegation was conclusory and the evidence presented was

insufficient to show alter ego. Although by default the allegations are admitted, the admission is only as to facts well pleaded. The default judgment in alter ego was set aside.

The Seymour court denied recovery in alter ego. The facts are similar to the within Sheet Metal case, a suit to recover contributions due employees' trust funds. The court refused to pierce the corporate veil, finding the more egregious forms of abuse - commingling of personal and corporate funds and personal use of corporate assets - were not present.

In this case at bench there was no evidence at all presented to prove alter ego liability.

In Seymour the court went on to say that assuming the corporation is rendered insolvent that does not show that some injustice might result if the veil is not pierced. An uncollectible judgment does not of itself constitute an inequitable result.

From the above, it appears clear that no cause of action in alter ego was stated or proven, and the judgment against the individuals may not stand.

Where the complaint does not state a cause of action, the Court has no jurisdiction in a default case to grant relief by default judgment.

Williams v. Foss, supra
Rose v. Lawton, supra

v

1. PUNITIVE DAMAGES ARE NOT RECOVERABLE IN ACTIONS FOUNDED IN CONTRACT.
2. ASSUMING A TORT WAS INVOLVED, THE AWARD OF \$300,000.00 PUNITIVE DAMAGES AGAINST THE CORPORATION AND THE INDIVIDUALS WAS CLEARLY ERRONEOUS, GIVEN UNDER PASSION AND PREJUDICE, AND VOID.
3. THE COURT OF APPEAL DID NOT MENTION OR RULE ON SUCH ISSUES THOUGH RAISED IN THE DISTRICT COURT AND ON APPEAL.

The complaint alleged an action for

breach of contract. In addition, Sheet Metal alleged that by reason of alter ego, refusing to pay contributions and concealing mechanic lien information, petitioners' actions were wilful, wanton, malicious and oppressive, violated California Civil Code, section 3097(k), and justifies \$300,000.00 punitive damages.

At the motion hearing for default judgment, the only evidence presented was in documentary form which requested the amount due under the agreement, which was the relief awarded by the Court.

(CR (DC) 31, 34, 35, 36, 38). No request for punitive damages in any specified amount was requested by Sheet Metal. The order for default judgment "added" \$300,000.00 punitive damages for failure to provide mechanic lien information and failure to pay contributions. The default judgment was for \$17,190.11 actual damages (amount owed for contributions), plus \$23,332.68 liquidated damages, and

\$300,000.00 punitive damages. (CR (DC) 46).

Punitive damages may not be recovered in actions founded in contract, no matter how wilful, or malicious, or fraudulent, except where the wrongful act is also a tort.

Hofmayer v. Dean Witter & Co. (DC 1978)
459 F. Supp. 733
Roam v. Koop (1974) 41 Cal.App.3d 1035
Jones v. Kelly (1929) 208 Cal. 251
Haigler v. Donnelly (1941)
18 Cal.2d 674, 680
Crogan v. Metz (1956)
47 Cal.2d 398, 405; 303 P.2d 1029
Dryden v. Tri-Valley Growers (1977)
65 Cal.App.3d 990
Civil Code, section 3294

Sheet Metal's and the Court's conclusive characterization of petitioners' conduct as intentional, wilful, fraudulent, was patently insufficient to show a tort. Proof of violation of good faith or fair dealing is insufficient.

Bronsseau v. Jarrett (1977)
73 Cal.App.3d 864
Beck v. State Farm (1976)
54 Cal.App.3d 347

Alleging facts on information and belief in the 4th and 5th counts are hearsay and may not support a default judgment. In

said counts, the purported facts alleged are obviously not within the personal knowledge of Sheet Metal or their counsel and are hearsay.

Butler v. McKey (CC Calif. 1943)
138 F.2d 373

The allegation that petitioners have withheld facts helpful to Sheet Metals' case is a complaint that petitioners refused to help Sheet Metal prove its case, which is not required.

Goodwin v. Home Buying Inv. Co. (DC 1973)
352 F. Supp. 413

Sheet Metal alleged petitioners have preferred other creditors of Baer Corp. That is not a tort even if it be true. It is not a breach of contract, nor proves alter ego, and not a basis for punitive damages. It is valid even though it makes the creditor insolvent.

Calif. Civil Code, sections 3432, 3451
5 Witkin, Calif. Proced. 2d Ed.
p. 3508, sec. 146

The Court of Appeal stated in a few words that Baer Corp. ceased operations and

pledged its entire property and accounts receivable to a lender. But that was the sole unsubstantiated contention of Sheet Metal, and obviously a hearsay allegation in the complaint having been alleged on information and belief. (par. 29, CR (DC) 1). No evidence of that was ever presented to the Court.

But the Court of Appeal failed to point out that such a statement was hearsay, which Sheet Metal's counsel stated was made by a person who was not a party to this case and outside of Court, and obviously a hearsay allegation, and further failed to point out that California statute, Civil Code, sec. 3432, authorizes such a preference, to give one creditor security for the payment of his demand in preference to another. (CR (DC) 26, p.8). My records show that the motion to strike answer and for default judgment intervened and was granted and the motion in which that alleged statement was made was never heard and ruled on.

Alter ego does not raise issues in tort. If established, it merely transfers liability to the alter ego.

California Civil Code, section 3097(k) and Labor Code, section 227, alleged by Sheet Metal in its complaint do not entitle Sheet Metal to punitive damages, even if such sections were violated.

In any event, a violation of said statutes does not give rise to civil liability. Such statutes are regulatory and disciplinary in nature, a valid exercise of police power, not applicable in civil actions for damages.

Swickheimer v. King (1971)
22 Cal.App.3d 220, 99 Cal.Rptr. 176
Cf Colonial Realty Corp. v. Bache & Co.
2d Cir. 1966) 358 F.2d 178,181,182
Housing Development Co. v. Hoschler
85 Cal.App.3d 379, 389, 149 Cal.Rptr.400
People v. Alves (1958)
155 Cal.App.2d Supp. 870, 872
3 Witkin, Calif.Proced. 2d Ed.
pp. 1971-1972,2006,2008,2010

The use of the words wrongfully, wilfully, fraudulently, oppressively, and maliciously adds nothing to the pleadings

or default judgment, except to convey a sense of outrage on the part of the pleader or judge.

Gruenberg v. Aetna Ins. Co. (1973)
9 Cal.3d 566, 586, 108 Cal.Rptr.
480,493

The Gruenberg court stated that such embellishments do not derogate from the contractual character of the pleading; that the liability sought to be imposed arises upon contract.

\$300,000.00 was awarded as punitive damages without presenting any evidence at the trial or hearing, as to which Montalvo v. Zamora applies here (7 Cal. App.3d 69, 86 Cal.Rptr. 401, 405 (1970)). That Court said:

". . . The amount of exemplary damages, if any, to be determined, not on the pleadings, but on the facts developed at the trial."

Here there was no trial; a default case. As to punitive damages, the following courts had to say that if there is no

allegation and no evidence of defendants' net worth, no punitive damages may be awarded, and, moreover, any such damages which exceed one-third of defendants' net worth could not be justified, except to put defendants out of business, bankrupt defendants, or be so enraged resulting in feeling of animosity rather than dispassionate determination of an amount necessary to assess defendants for purposes of deterrence.

Zhadan v. Downtown L. A. Motors (1976)
66 Cal.App.3d 481
Allard v. Church of Scientology etc.
(1976) 58 Cal.App.3d 439

Under the circumstances here, the District Court had no jurisdiction to award punitive damages in any amount.

VI

1. THE DISTRICT COURT HAD NO JURISDICTION TO IMPOSE PUNITIVE DAMAGES OR SANCTIONS.
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THAT ISSUE THOUGH RAISED IN THE DISTRICT COURT AND ON APPEAL.

In awarding \$300,000.00 the District Court stated in its Order for default judgment that defendants shall pay \$300,000.00 "as and for punitive damages, for their wilful, malicious and oppressive failure to provide mechanic lien information and failure to pay contributions with fraudulent intent . . .".

From the above it appears uncertain whether punitive damages or sanctions were awarded.

Punitive damages are awarded by way of punishment, for sake of example, in a tort case. Not for breach of contract no matter how wilful, malicious, oppressive, or fraudulent. (Argument V)

Calif. Civil Code, sec. 3294
Richardson v. Employers Liability
Ass. Corp. (1972) 25 Cal.App.3d 232,
102 Cal.Rptr. 547
Roam v. Koop, supra

Sanctions are imposed in discovery cases, to enable a party to obtain the objects of discovery he seeks. But the Court may not impose sanctions which are designed not to

accomplish discovery, but to impose punishment.

Betty Stein v. Erwin Hassen (1973)
34 Cal.App.3d 294, 109 Cal.Rptr.321
Jacuzzi v. Jacuzzi Bros., Inc. (1966)
243 Cal.App.2d 1, 52 Cal.Rptr. 147

The clear meaning of the District Court was to punish petitioners by the \$300,000.00 assessment or award in addition to imposing the ultimate sanction of striking the answer and entering a default judgment.

The \$300,000.00 award was clearly erroneous and beyond the jurisdiction of the District Court to impose, whether it was imposed as a discovery sanction or as punitive damages under the complaint. The point is supported by competent authorities as shown in Argument V herein, and as follows:

Petitioners were sanctioned \$1,500.00 in the court's contempt order for alleged refusal to comply with the preliminary injunction.

The contempt order further ordered petitioners to comply with the preliminary

injunction by April 17, 1981.

But the preliminary injunction was void,

(a) because the District Court had no jurisdiction to enjoin or prevent the breach of a contract.

Calif. Civil Code, section 3423(5)

(b) because the injunction was never served on petitioners.

(c) because the TRO and OSC enjoined petitioners from "concealing and failing or refusing to disclose to plaintiffs any of the following" information itemized and the OSC was why the Court should not make such an order. The Court's findings and conclusions of law at the hearing were completely outside the scope of the TRO and OSC, except for finding No. 12 which recited the TRO (CR (DC) 8,9). The preliminary injunction ordered petitioners to produce and deliver to plaintiff certain described mechanic lien information by 5:00 P.M. on February 17, 1981.

It is manifestly apparent that the Court

made an entirely different order (preliminary injunction) than the one the TRO and OSC requested and gave notice of, and because of lack of notice and due process the Court had no jurisdiction to make the alleged injunction. And, moreover, all of the alleged facts alleged to obtain the TRO, OSC and injunction occurred prior to the commencement of the instant action. Plaintiffs had no right to discovery before filing their action. After filing the action plaintiffs had not requested discovery, and since there was no refusal to provide discovery the Court had no jurisdiction to order petitioners to comply with an unrequested discovery, or compel petitioners to comply with a request for records made prior to commencement of their action.

Because the preliminary injunction was void, so was the contempt order. The Court may not hold petitioners in contempt for refusing to comply with a void order.

The contempt order was also void for the reasons given in Arguments VII and VIII.

When plaintiffs moved to strike the answer and for default judgment, the grounds for their motion was refusal or failure to comply with the injunction and contempt order. In their motion, plaintiffs requested attorney's fees and costs, in addition to contributions and delinquency fees. No sanctions were requested.

(CR (DC) 31, 34, 35, 38). Assuming proper notice was given of the motion, petitioners had no notice that sanctions would be requested and therefore the lack of such notice was a denial of due process and gave the Court no jurisdiction to impose \$300,000.00 sanctions or any other amount.

Moreover, since the grounds of that motion were refusal to comply with the injunction and the contempt order both of which were void, no grounds existed for the Court to strike the answer and enter a default judgment, and the Court's orders

to that effect are void.

Moreover, when the answer was struck, the Court lost jurisdiction of the petitioners (defendants) who were no longer before the Court and who no longer had a voice in the proceedings, and therefore the Court could not sanction petitioners, and make an award beyond the scope of the complaint.

Moreover, and as to punitive damages, in the motion to strike and for default judgment no punitive damages were requested, and no evidence was produced to justify an award of punitive damages in any amount, and for that reason and for the reasons given in Argument V, the Court had no authority to award punitive damages.

VII

1. THE PRELIMINARY INJUNCTION AND THE CONTEMPT ORDER OF THE DISTRICT COURT WERE VOID AND ON THAT GROUND DID NOT PROVIDE A BASIS FOR THE DISTRICT COURT'S ORDER STRIKING ANSWER, ORDER FOR DEFAULT JUDGMENT, AND DEFAULT JUDGMENT.
2. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THOSE ISSUES RAISED IN THE DISTRICT COURT AND ON APPEAL.

That petitioners were "properly" found in contempt for failure to comply with the preliminary injunction, as the Court of Appeal stated, was a clearly erroneous conclusion. And, moreover, the District Court did not impose a "fine" for that reason. An award of \$1,500.00 attorney's fees payable to counsel can never be a fine. A fine is payable to the Court.

The record shows without dispute that the TRO and OSC were served only on Baer Corp. and Renee. The preliminary injunction

was served only on Mr. Chandler.

Moreover, Sheet Metal's motion for a contempt order for failure to comply with the preliminary injunction was served by mail only on Mr. Chandler, and no order was made authorizing service by mail.

The contempt order was based on failure to comply with the preliminary injunction.

The contempt order was not served on Baer Corp., Marlin and Renee. It was served by mail on Mr. Chandler only, there being no order to serve by mail.

Personal service was required, the absence of which does not give the Court jurisdiction over the party not served. It is necessary that one charged with a preliminary injunction and contempt have knowledge of both. Here, there was no service of the (a) preliminary injunction, (b) the motion for contempt, and (c) the contempt order, on petitioners. The fact petitioners are parties does not charge them with knowledge, nor may the declaration

of a party to be held in contempt supply the deficiencies in the moving party's declaration, nor by proof upon hearing. A defective declaration as well as no service do not give the Court jurisdiction to proceed in contempt, which renders the proceedings void ab initio, and the contempt order null and void.

Phillips v. Superior Court (1943)
22 Cal.2d 256, 258, 137 P.2d 838

The conclusion to be drawn from the above is that the District Court had no jurisdiction to strike the answer, order a default judgment, and enter a default judgment.

The Court of Appeal seems to find support in that Renee was (a) served writs of execution, (b) attended one hearing, and (c) March 9 did comply in part with the preliminary injunction by supplying Sheet Metal with 43 documents. But that appears only on the surface. As to (a) the writs were served after the order for

default judgment was made and filed on June 30, 1981; as to (b) the hearing was held in chambers between judge and counsel only; as to (c) Baer Corp. and not Marlin or Renee furnished 43 documents to Sheet Metal stating under oath that in substance Baer Corp. had no other records showing mechanic lien information with explanations.

CR (DC) 19.

A preliminary injunction can not be granted to prevent the breach of a contract.

Calif. Civil Code, sec. 3423(5)
Calif. Code of Civil Procedure,
sec. 526, second subd. (5)
Thayer Plymouth Center v. Chrysler
Motors Corp. (1967) 255 Cal.App.2d 300,
304, 63 Cal.Rptr. 148

The failure to pay contributions and to furnish the mechanic lien information records, both required by the alleged contract, amounts to a breach of contract, no matter how wilful or malicious or fraudulent.

A relevant and important fact is that the delinquency occurred in June, 1980,

which continued through November, 1980. Since Sheet Metal had 90/30 days to file a mechanic lien (Calif. Civil Code, sec. 3116) the lien was barred at the time the action was filed on February 10, 1981, which bar continued and became certain on February 18, 1981, at the time the preliminary injunction was issued, and prior to May 28, 1981, when the contempt order was entered. Thus, the issue of mechanic lien information became moot, and no action exists in contempt or injunction to enforce a moot issue.

VIII

1. SINCE THE BASIS FOR CONTEMPT IS THE WILFUL REFUSAL OR FAILURE TO COMPLY WITH THE PRELIMINARY INJUNCTION, SHEET METAL HAD THE BURDEN OF PROVING WILFUL REFUSAL OR FAILURE TO COMPLY WHICH SHEET METAL FAILED TO SUSTAIN, AND THE CONTEMPT ORDER WAS VOID ON THAT GROUND.

2. THE COURT OF APPEAL DID NOT MENTION
OR RULE ON THOSE ISSUES RAISED IN
THE DISTRICT COURT AND ON APPEAL.

The word "wilful" implies that subject party has the ability to comply, for if he lacks ability there is no wilful failure on his part.

People v. Alves, *supra*.

The underlying basis for the TRO, OSC and preliminary injunction was for petitioners to furnish Sheet Metal mechanic lien information to enable Sheet Metal to file mechanic liens to secure payment of delinquent contributions.

The relevant facts are on December 29, 1980, Sheet Metal for the first time gave written notice to Baer Corp. demanding payment of delinquent contributions or mechanic lien information. Since full payment was not made Sheet Metal filed suit on February 10, 1981, demanding mechanic lien information for the delinquent

period June to November, 1980. A TRO and OSC were obtained on February 10, 1981, to obtain mechanic lien information, which were served only on Baer Corp. and Renee. The Court ordered personal service. On February 17, 1981, at the hearing the Court found Baer Corp. was delinquent for said period, and that upon written notice Baer Corp. was obligated to furnish mechanic lien information for the delinquency period. Only Baer Corp. and Renee were served. Baer Corp., Renee, Marlin and Monroy failed and refused to comply therewith. Mechanic liens must be filed within 90 days after completion and Sheet Metal may be barred from filing such liens. On February 18, 1981, the preliminary injunction was issued ordering Baer Corp., Marlin, Renee and Monroy, by February 17, 1981, to furnish all mechanic lien information described therein, which was served only on Mr. Chandler, attorney.

On March 9, 1981, Baer Corp. supplied

Sheet Metal with 43 documents, which Sheet Metal deemed insufficient, and on March 24, 1981, filed a motion to hold all defendants in contempt, set for April 6, 1981. The supporting papers alleged that the 43 documents were insufficient, no further records were supplied, and that they failed or refused to supply the appropriate lien information records.

In response, on behalf of Baer Corp., Renee, under penalty of perjury, stated she made a reasonable search and sent to Sheet Metal all the records she could find and gave reasonable explanations why the records sent were incomplete, and to cooperate and show good faith she sent and assigned to Sheet Metal two collectible accounts receivables totalling \$14,905.00 which approximated the amount alleged in the complaint.

Although the Court's contempt order (CR (DC) 29) states defendants are found to be in willful and deliberate contempt

and violation of the Court's preliminary injunction, there is no evidence to support that finding. At no time did Sheet Metal or its attorneys state under oath that (a) petitioners had knowledge of the preliminary injunction; (b) appropriate lien records exist; (c) defendants have possession, control and ability to produce same; (d) but wilfully refused or failed to do so.

Under those circumstances the contempt order is void, and subject to collateral attack.

People v. Alves, supra
Phillips v. Superior Court, supra

IX

1. THE DEFAULT JUDGMENT SHOULD HAVE BEEN VACATED AND RELIEF PROVIDED TO PETITIONERS IN ACCORDANCE WITH FRCP 60(b)(1) AND/OR 60(b)(6).
2. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PETITIONERS' MOTION FOR RELIEF.
3. THE COURT OF APPEAL ERRED IN AFFIRMING THE DENIAL OF RELIEF.

The FRCP Rules cited above permits relief from a final judgment if the movant demonstrates justifiable grounds of mistake, inadvertence, surprise, excusable neglect or "any other reason justifying relief from the operation of the judgment, including a meritorious defense.

It appears without dispute that petitioners have a meritorious defense to the claims asserted in plaintiffs' complaint, for instance a meritorious defense is shown herein in

1. Argument IV as to the claim of alter ego, as to which no cause of action was stated.
2. Argument V as to the claims under Civil Code, section 3097(k) and Labor Code, section 227 which were irrelevant and not applicable.
3. Argument V as to the claim of punitive damages, which was not allowable and no jurisdiction to award.
4. Argument II as to the petitioners'

attorney, Mr. Chandler, whose incompetence and outrageous conduct, and his abandonment of petitioners' cause, prejudiced any defense petitioners had.

5. Argument III as to the claim for damages and other relief beyond and in excess of the allegations of the complaint, as to which the Court had no jurisdiction.

6. Arguments VI and VII, as to the claim of refusal to comply with the Court's injunction and contempt order, both being void.

7. Argument X as to the claim the default judgment was valid, when Arguments II to VIII show that since the injunction and contempt order were void, the Court had no jurisdiction to strike the answer and enter a default judgment.

A leading case in California is Deyo v. Kilbourne (1978) 84 Cal.App.3d 771, 149 Cal.Rptr. 499, a 21 page decision which reviewed almost every imaginable discovery problem. As to the imposition of the

ultimate sanction of dismissal (or striking answer and entering a default judgment, both being the same in principle) the Deyo court stated that it is error to dismiss the entire claim (defense) where the documents sought did not go to a dispositive issue. The sanction should not operate to put the plaintiff in a better position than he would have had if discovery had been made which would have been completely favorable to his cause. There are 12 relevant factors which must be examined before the ultimate sanction is imposed. Judicial discretion implies absence of arbitrary determination, capricious disposition, or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason.

X

1. FIVE WRITS OF EXECUTION ON THE ALLEGED DEFAULT JUDGMENT WERE ISSUED AND LEVIED OVER ONE MONTH BEFORE THE DISTRICT COURT MADE, SIGNED AND FILED THE DEFAULT JUDGMENT.
2. THE DISTRICT COURT REFUSED TO RECALL AND QUASH THE WRITS. THE COURT OF APPEAL DID NOT MENTION OR RULE ON THAT ISSUE.

It appears that the said Writs are void, there being no legal basis for their issuance and levy upon the real property of Marlin and Renee to satisfy a corporate debt.

CONCLUSION

As seen from the above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-5035
D.C. # CV 81-652 MRP

SHEET METAL WORKERS PENSION PLAN OF
SOUTHERN CALIFORNIA, ARIZONA AND
NEVADA; SHEET METAL WORKERS WELFARE
PLAN OF SOUTHERN CALIFORNIA, ARIZONA
AND NEVADA; and SHEET METAL WORKERS
SAVINGS PLAN OF SOUTHERN CALIFORNIA,

Plaintiffs/Appellees,

vs.

BAER MANUFACTURING, INC.,
a California corporation;
MARLIN C. BAER; and RENEE B. BAER,

Defendants/Appellants.

MEMORANDUM

Appeal from The United States District Court for the Central District of California, Honorable Mariana R. Pfaelzer, District Judge, Presiding; Argued and Submitted December 9, 1982

Before: TANG and POOLE, Circuit Judges, and EAST,* District Judge

We affirm the district court's denials of motions by Baer Manufacturing, Inc., and its acting officers and directors Marlin Baer and Renee Baer (collectively "Baer"), for extensions of time to file notices of appeal and to vacate default judgment.

Baer failed to make the monthly payments required of employers who were signatories to the Sheet Metal Workers Pension Plans. Baer then ceased operations and pledged its entire property and accounts receivable to a lender. On February 10, 1981, Sheet Metal sued Baer for delinquent payments, requested an

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

order requiring Baer to make future payments and to provide mechanics lien information.

At the hearing on a temporary restraining order, Baer was represented by counsel but offered no opposition. A preliminary injunction was thereafter issued. Baer next failed to comply with the order that the information be furnished by February 17. Three weeks later Baer filed an answer to the complaint denying that any money was owed to Sheet Metal. Baer supplied some but not all of the documents required by the order.

In view of this conduct, the district court properly found Baer in contempt for having "willfully and deliberately" violated the preliminary injunction by providing inadequate information. The court entered an order of contempt imposing a fine against Baer and ordering compliance with the preliminary injunction.

Baer failed to pay or comply. On Sheet Metal's motion the court struck Baer's answer and entered a default judgment.

Baer's counsel disappeared and was not replaced by a new attorney until August 27. The new counsel filed a motion for extension of time in which to file a notice of appeal. He furnished no supporting affidavits or documents and the district court denied this motion for failure to show good cause for the extension. Final judgment was entered on August 31. Subsequent motions for extension of time to file notice of appeal and to vacate default judgment were denied on November 24.

Denials of extension of time to appeal and refusals to set aside default judgment will not be disturbed unless the court has abused its discretion. National Industries v. Republic National Life Insurance Company, 677 F.2d 1258, 1264 (9th Cir. 1982).

We find no abuse of discretion in the court's decisions to deny extension of time and to vacate the default judgment. All such motions were untimely. The facts clearly indicated that Baer was aware of the default judgment before it was entered, was aware of the pending lawsuit and of the court orders before the default had been granted. Defendants Renee Baer and Baer, Inc. were both served with the complaint and temporary restraining order. Renee Baer was served writs of execution and had attended at least one hearing. Baer was represented by counsel at the February 17 hearing and on March 9 did comply in part with the preliminary injunction by delivering some 43 documents to Sheet Metal. Although Baer claims that the failure to respond to the district court's orders was due to an unauthorized excursion by counsel, no evidence was presented in support of that contention. There was thus insufficient "excuse or

explanation" for Baer's failure to comply.

AFFIRMED.